Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-799

BUCKINGHAM TOWNSHIP BOARD OF SUPERVISORS,
Petitioners,

v.

HERBERT BARNESS, IRMA BARNESS, JOSEPH A. CICCONE, NORMA J. CICCONE, JOHN F. ENDERS, JR., and DELLA ENDERS, His Wife, JOHN F. ENDERS, JR., DELLA E. ENDERS and WILLIAM J. SHEDDEN, JR., ROBERT H. YAROSCHUK, K. PATRICIA YAROSCHUK, CLAUDE J. SCHLANGER and DONALD GREENBERG, BENJAMIN SEIDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, and ALVIN NEINBERG, Individuals t/a FAIRWAY-SMITH ASSOCIATES,

Respondents.

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court.

PETITIONERS' SUPPLEMENTAL BRIEF.

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Supreme Court of the United States

October Term, 1978

No. 78-199

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, et al.

Petitioners,

v.

HERBERT BARNES, et al.,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF.

Petitioners, Board of Supervisors of Buckingham Township, by their attorneys,[1] respectfully represent to the Court:

1. Enactment by General Assembly of Pennsylvania

Subsequent to the Pennsylvania Supreme Court's denial of Petitioner's Petition for Allowance of Appeal, and after time for the filing of a motion for rehearing had passed, but before this Petition for Certiorari was filed, the Governor of Pennsylvania signed into law Act 1978-249 (the "Act").[2] The Act amended the Pennsylvania Municipalities Planning Code,[3] inter alia, to provide that with respect to the filing of substantive challenges, such

1. Goncer M. Krestal, Lawrence J. Beaser, and Blank, Rome, Klaus & Comisky, attorneys for Petitioners were retained to represent Petitioners in this litigation subsequent to the filing of the Petition for Writ of Certiorari.

2. Senate Bill 1008, Printer's Number 2166. The new Act is set forth as a Supplemental Appendix beginning at p. A1.

3. Act of July 31, 1968, P. L. 805, as amended, 53 P. S. § 10101 et seq.

as those filed by Respondents [4] landowners must file a certification that

> ". . . the landowner did not know at the time of the application (i) that the municipality had resolved to consider a particular scheme of rezoning by publication of notice of hearings on a proposed comprehensive plan or a proposed zoning ordinance or otherwise, or (ii) that the scheme of rezoning would be inconsistent with the landowner's proposed use. . . ." Supplemental Appendix at A7.

The Act also prohibits a court from granting or enforcing relief with respect to a substantive challenge, such as was filed by Respondents in the instant case, "without first making an affirmative finding of fact that the landowner's certification . . . has in fact been made and is true and correct." Supplemental Appendix at A9.

Section 8 of the Act specifically applies the above quoted sections "to substantive challenges within the jurisdiction of any court on the effective date of this act."[5]

The instant litigation was clearly within the jurisdiction of a court on October 5, 1978, the effective date of the Act. Thus, by its terms, the statute applies to this case. Moreover, based upon the record below, Respondents would not be able to make the required certification, since Respondents knew of the Township's efforts to rezone, and of the particular new zoning proposal. See Petition for

4. See Petition for Writ of Certiorari at 9.

5. Section 8 states:

"Section 8. (a) Anything in this act to the contrary notwithstanding, the procedures established by section 1011 of this act shall apply to substantive challenges within the jurisdiction of any court on the effective date of this act.

(b) It is hereby declared that the provisions of subsection (a) are found to be needed to alleviate the problems caused by uncoordinated development of municipalities and are essential to the maintenance of the health, safety and welfare of the residents of the Commonwealth." Supplemental Appendix at A12.

Writ of Certiorari at 33. The Courts of Pennsylvania thus would be precluded from granting any relief to Respondents. In such an event, this Court would not have to resolve the serious Federal constitutional questions raised in the Petition for Writ of Certiorari.

Therefore, Petitioners respectfully pray that the Court grant the Petition for Writ of Certiorari, vacate the judgment below, and remand the case for consideration of the applicability of Pennsylvania Act 1978-249 thereto. *Thorpe v. Housing Authority of the City of Durham*, 386 U. S. 670, 87 S. Ct. 1244, 18 L. Ed. 2d 394 (1967) and 393 U. S. 277, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969). See also *Bradley v. School Board of City of Richmond*, 416 U. S. 714, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974).

2. Vested Rights of Respondents

Former counsel for Petitioners characterized the opinions of the Pennsylvania Commonwealth Court and the Court of Common Pleas of Bucks County as holding that Respondents had gained a "vested right" to develop their land in the manner set forth in their curative amendments. That statement was not authorized by Petitioners and is inaccurate.

Not only did the courts below not use the term "vested right" but the Pennsylvania Commonwealth Court, in quoting from *Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 230, 328 A. 2d 464 (1974) (Appendix at 24), applied a balancing test to determine whether or not landowners, such as Respondents, are entitled to develop according to the curative amendment submitted. This explicit balancing test requires that Respondents proposals constitute "reasonable development plans." Indeed, this was recognized by the Court of Common Pleas of Bucks County which made development by Respondents "subject to reasonable restrictions to protect the public health, safety, welfare and morals." Appendix at 14-15.

Certainly, there is nothing in the opinions below which would impute a determination of the state courts that Re-

spondents had a "vested right" to develop their land forever protected from possible exercise by the Pennsylvania General Assembly of its police power, such as occurred with the enactment of Act 1978-249.

Any contrary characterization of the decisions below contained in the Petition for Writ of Certiorari was not intended or authorized by Petitioners.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

HOUSE AMENDED.
PRIOR PRINTER'S NOS. 1168, 1794, 1881, 2103.
PRINTER'S NO. 2166.

THE GENERAL ASSEMBLY OF PENNSYLVANIA.

SENATE BILL NO. 1008.

Session of 1977.

INTRODUCED BY HOWARD, LEWIS AND STAUFFER, JULY 6, 1977.

AS AMENDED ON THIRD CONSIDERATION, HOUSE OF REPRESENTATIVES, SEPTEMBER 21, 1978.

AN ACT.

Amending the act of July 31, 1968 (P. L. 805, No. 247), entitled, as amended, "An act to empower cities of the second class A, and third class, boroughs, incorporated towns, townships of the first and second classes including those within a county of the second class and counties of the second class A through eighth classes, individually or jointly, to plan their development and to govern the same by zoning, subdivision and land development ordinances, planned residential development and other ordinances, by official maps, by the reservation of certain land for future public purpose and by the acquisition of such land; providing for the establishment of planning commissions, planning departments, planning committees and zoning hearing boards, authorizing them to charge fees, make inspections and hold public hearings; providing for appropriations, appeals to courts and penalties for violations; and repealing acts and parts of acts," further providing time

limitations regarding certain public hearing findings; further providing for zoning ordinances, further regulating the time of hearings, and further providing for substantive challenges.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 603 and clause (2) of section 605, act of July 31, 1968 (P. L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code," are amended to read:

Section 603. Ordinance Provisions.—Zoning ordinances may permit, prohibit, regulate, restrict and determine:

(1) Uses of land, watercourses and other bodies of water;

(2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures;

(3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures;

(4) Density of population and intensity of use.

In addition, zoning ordinances may contain:

(1) Provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;

(2) Provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency, pursuant to express standards and criteria set forth in the ordinances;

(3) Provisions for the administration and enforcement of such ordinances; [and]

(4) Such other provisions as may be necessary to implement the purposes of this act; *and*

(5) Provisions for the protection and preservation of natural resources and agricultural land and activities.

Section 605. Classifications.—In any municipality, other than a county, which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district, except that additional classifications may be made within any district:

* * *

(2) For the regulation, restriction or prohibition of uses and structures at or near (i) major thoroughfares, their intersections and interchanges, and transportation arteries, (ii) natural or artificial bodies of water, (iii) places of relatively steep slope or grade, *or other areas of hazardous geological or topographic features,* (iv) public buildings and public grounds, (v) aircraft, helicopter, rocket, and spacecraft facilities, (vi) places having unique historical or patriotic interest or value, (vii) flood plain areas, ~~*agricultural areas, forests, wetlands, aquifers,*~~ and other places ~~*or natural features*~~ having a special character or use affecting and affected by their surroundings. As among several classes of zoning districts, the provisions for permitted uses may be mutually exclusive, in whole or in part.

Section 2. The act is amended by adding a section to read:

Section 609.2. Procedure Upon Municipal Curative Amendments.—(1) A municipality, ~~its governing body, or its planning agency,~~ by (formal action,) may declare its

zoning ordinance or portions thereof substantively invalid and propose to prepare a curative amendment to overcome such invalidity. Within thirty days following such declaration and proposal ~~by the governing body or planning agency~~, the governing body of the municipality shall:

(a) By resolution make specific findings setting forth the declared invalidity of the zoning ordinance which may include: (i) references to specific uses which are either not permitted or not permitted in sufficient quantity, (ii) reference to a class of use or uses which require revision, or (iii) reference to the entire ordinance which requires revisions.

(b) Begin to prepare and consider a curative amendment to the zoning ordinance to correct the declared invalidity.

(2) Within ~~two hundred seventy~~ ONE HUNDRED EIGHTY days from the date of the declaration and proposal, the municipality shall enact a curative amendment to, or reaffirm the validity of, its zoning ordinance pursuant to the provisions required by section 609, to cure the declared invalidity of the zoning ordinance.

(3) Upon the initiation of the procedures, as set forth in subsection (1), the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1 nor shall the Zoning Hearing Board be required to give a report requested under section 910 or 913.1 subsequent to the declaration and proposal based upon the grounds identical to or substantially similar to those specified in the resolution required by subsection (1)(a). Upon completion of the procedures as set forth in subsections (1) and (2), no rights to a cure pursuant to the provisions of sections 609.1 and 1004 shall, from the date of the declaration and proposal, accrue to any landowner on the basis of the substantive invalidity of the unamended zoning ordinance for which there has been a curative amendment pursuant to this section.

(4) A municipality having utilized the procedures as set forth in subsections (1) and (2) may not again utilize said procedure for a thirty-six-month period following the date of the enactment of a curative amendment, or reffirmation of the validity of its zoning ordinance, pursuant to subsection (2); provided, however, if after the date of declaration and proposal there is a substantially new duty or obligation imposed upon the municipality by virtue of a change in statute or by virtue of a Pennsylvania Appellate Court decision, the municipality may utilize the provisions of this section to prepare a curative amendment to its ordinance to fulfill said duty or obligation.

Section 3. The introductory paragraph of subsection (a) of section 709 is amended to read:

Section 709. The Findings.—(a) The governing body, within [thirty] *sixty* days following the conclusion of the public hearing provided for in this article, shall, by official written communication, to the landowner, either:

* * *

Section 4. Subsection (9) of section 908, amended December 10, 1974 (P. L. 822, No. 272), is amended to read:

Section 908. Hearings.—The board shall conduct hearings and make decisions in accordance with the following requirements:

* * *

(9) The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within forty-five days after the last hearing before the board or hearing officer. Except in home rule municipalities, where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. Conclusions based on any provisions of this act or of any ordinance,

rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. If the hearing is conducted by a hearing officer, and there has been no stipulation that his decision or findings are final, the board shall make his report and recommendations available to the parties and the parties shall be entitled to make written representations thereon to the board prior to final decision or entry of findings, and the board's decision shall be entered no later than forty-five days after the decision of the hearing officer. Where the board fails to render the decision within the period required by this subsection, or fails to hold the required hearing within [forty-five] *sixty* days from the date of the applicant's request for a hearing, the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision as hereinabove provided, the municipality shall give public notice of said decision within ten days in the same manner as provided in subsection (1) of this section. Nothing in this subsection shall prejudice the right of any party opposing the application to urge that such decision is erroneous.

• • •

Section 5. Clause (a) of subsection (2) of section 1004 of the act, added June 1, 1972 (P. L. 333, No. 93), is amended to read:

Section 1004. Validity of Ordinance; Substantive Questions; Landowner Appeals.—• • •

(2) The submissions referred to in subsection (1) shall be governed by the following:

(a) The landowner shall make a written request to the board or governing body that it hold a hearing on his challenge. The request shall contain a short statement reasonably informing the board or the governing body of the

matters that are in issue and the grounds for the challenge. *Such statement shall contain a certification that the landowner did not know at the time of the application (i) that the municipality had resolved to consider a particular scheme of rezoning by publication of notice of hearings on a proposed comprehensive plan or proposed zoning ordinance or otherwise, or (ii) that the scheme of rezoning would be inconsistent with the landowner's proposed use; provided that this rezoning scheme had reached sufficient particularity to disclose that, if adopted, it would cure the defect in the zoning ordinance attacked by the substantive challenge.*

• • •

Section 6. Subsections (1) and (2) of section 1011 of the act, added June 1, 1972 (P. L. 333, No. 93), are amended and a subsection is added to read:

Section 1011. Judicial Relief.—(1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal, *only if it determines that:*

(a) the municipality has not acted in good faith or made a bona fide attempt in the adoption of its ordinances or maps, or any amendments thereto, to meet the statutory and constitutional requirements for nonexclusionary zoning; or

(b) the ordinance imposes limitations that are not reasonably related to the municipality's authority to determine its physical growth pattern, protect the Commonwealth's public natural resources, coordinate development with the provision of public services, or protect the character of the community. Where municipalities have adopted a joint municipal comprehensive plan and enacted zoning legislation consistent with the joint municipal comprehensive plan within a region pursuant to Articles XI and XI-A, the court, when determining the validity of a chal-

lenge to such a municipality's zoning ordinance shall consider the zoning ordinance or ordinances as they apply to the entire region and shall not limit its consideration to the application of the zoning ordinance within the boundaries of the respective municipalities.

(2) If the court, *in accordance with the standards provided in subsection (1),* finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order. *In issuing its order the court shall consider the following: (i) the locational suitability of the site for the uses proposed including the general location of the site with regard to major roads, sewer facilities, water supplies, schools and other public service facilities or the comprehensive plan and zoning ordinance of the municipality and the county if they exist; (ii) the impact of the proposal on regional housing needs, the transportation network, and the other public services and facilities; (iii) the suitability of the site for the intensity of use proposed by the site's soils, slopes, woodland, wetlands, flood plains, aquifers, natural resources and other natural features; (iv) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plains, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and (v) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.*

Upon motion by any of the parties or upon motion by the court, the judge of the court may hold a hearing or hearings to receive additional evidence or employ experts to aid the court to frame an appropriate order. If the court employs an expert, the report or evidence of such expert shall be available to any party and he shall be subject to examination or cross-examination by any party. He shall be paid reasonable compensation for his services which may be assessed against any or all of the parties as determined by the court. The court shall retain jurisdiction of the appeal during the pendency of any further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

* * *

(4) No court shall grant or enforce relief with respect to a substantive challenge without first making an affirmative finding of fact that the landowner's certification required by section 1004(2)(a) has in fact been made and is true and correct.

Section 7. The act is amended by adding an article to read:

ARTICLE XI-A

Joint Municipal Zoning

Section 1101-A. General Powers.—The governing body of each municipality cooperating in a joint municipal comprehensive plan, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal joint municipal zoning ordinances to implement the joint municipal comprehensive plan and to accomplish any of the purposes of this act. For these purposes, a municipality may enact ~~either:~~

~~*(1) a joint municipal zoning ordinance which has been or is to be enacted by each municipality cooperating in the joint municipal comprehensive plan; or*~~

~~(2)~~ ~~*its own zoning ordinance consistent with the joint municipal comprehensive plan.*~~ *AND OR ADOPT A JOINT MUNICIPAL ZONING ORDINANCE WHICH HAS BEEN OR IS TO BE ENACTED BY EACH MUNICIPALITY COOPERATING IN THE JOINT MUNICIPAL COMPREHENSIVE PLAN.*

Section 1102-A. Compliance With Code.—The governing body of each municipality cooperating in a joint municipal comprehensive plan and zoning ordinance shall otherwise comply with all applicable sections of the act.

Section 1103-A. Joint Municipal Comprehensive Plan. —(a) The governing body of a municipality, by formal action, may ~~declare its intention to adopt a~~ ADVERTISE A PROPOSED joint municipal comprehensive plan. The municipality shall have ~~one hundred eighty~~ SIXTY days from the date of ~~this declaration~~ THE ADVERTISEMENT to adopt such a plan.

(b) During this period of time, the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1, nor shall the zoning hearing board be required to give a report requested under section 910 or 913.1, subsequent to the ~~declaration~~ ADVERTISEMENT required by subsection (a) and based upon the municipality's existing zoning ordinance.

Section 1104-A. Intention to Enact Zoning Ordinances.—(a) Subsequent to, or simultaneous with, the adoption of a joint municipal comprehensive plan, the governing body of a municipality cooperating in that plan, may declare its intention to enact a zoning ordinance pursuant to section 1101-A BY ADVERTISING THE SAME. The municipality shall have ~~one hundred eighty~~ ONE HUNDRED TWENTY days from the date of this ~~declaration~~ ADVERTISEMENT to enact such an ordinance.

(b) During this period of time, the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1, nor shall the zoning hearing board be required to give a report requested under section 910 or 913.1, subsequent to the ~~declaration~~ ADVERTISEMENT required by subsection (a) and based upon the municipality's existing zoning ordinance.

SECTION 1105-A. ADOPTION OF REGIONAL ZONING ORDINANCES.—(A) THE GOVERNING BODY OF EACH MUNICIPALITY PARTICIPATING IN THE JOINT MUNICIPAL COMPREHENSIVE PLAN SHALL ADOPT THE REGIONAL ZONING ORDINANCE IN ORDER FOR THE REGIONAL ORDINANCE TO BE EFFECTIVE.

(B) ONCE THE REGIONAL ORDINANCE IS EFFECTIVE THE MUNICIPAL ZONING ORDINANCE SHALL BE NULL AND VOID.

SECTION 1106-A. AMENDMENTS TO REGIONAL ZONING ORDINANCE.—(A) AMENDMENTS T ' THE REGIONAL ZONING ORDINANCE SHALL BE APPROVED BY A SIMPLE MAJORITY OF ALL PARTICIPATING MUNICIPALITIES INCLUDING THE MUNICIPALITY OR MUNICIPALITIES WHICH WILL BE PHYSICALLY AFFECTED BY THE PROPOSED AMENDMENT.

(B) THE SAME PROCEDURES SHALL BE FOLLOWED IN AMENDING THE REGIONAL ZONING ORDINANCE AS ARE SET FORTH IN ARTICLE VI.

SECTION 1107-A. REGIONAL HEARING BOARD. —(A) A REGIONAL HEARING BOARD IS HEREBY ESTABLISHED. IT SHALL POSSESS THE SAME POWERS AND DUTIES WITH RESPECT TO THE REGION AS THE ZONING HEARING BOARD PRESENTLY ENJOYS PURSUANT TO ARTICLE IX.

(B) EACH MUNICIPALITY SHALL APPOINT ONE PERSON TO SERVE ON THE REGIONAL HEARING BOARD.

SECTION 1108-A. INTENTION TO WITHDRAW. —A MUNICIPALITY MAY ANNOUNCE ITS INTENTION TO WITHDRAW FROM THE REGIONAL ZONING ORDINANCE, THE REGIONAL HEARING BOARD AND THE JOINT MUNICIPAL COMPREHENSIVE PLAN BY PASSING A RESOLUTION STATING THEREIN ITS INTENTION TO WITHDRAW. THE WITHDRAWAL SHALL NOT BECOME EFFECTIVE FOR A PERIOD OF THREE YEARS FROM THE DATE OF THE PASSING OF THE WITHDRAWAL RESOLUTION.

Section 8. (a) Anything in this act to the contrary notwithstanding, the procedures established by section 1011 of this act shall apply to substantive challenges within the jurisdiction of any court on the effective date of this act.

(b) It is hereby declared that the provisions of subsection (a) are found to be needed to alleviate the problems caused by uncoordinated development of municipalities and are essential to the maintenance of the health, safety and welfare of the residents of the Commonwealth.

Section 9. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section 10. This act shall take effect immediately.